Supreme Court, U.S.
FILED

961029 DEC 23 1996

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LOCAL 100, SERVICE EMPLOYEES INTERNATIONAL UNION,

Petitioner,

v.

FOUNDATION INDUSTRIES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Spencer Livingston
1024 Elysian Fields
New Orleans. LA 70117
(504) 943-5954

Steve Bachmann
Counsel of Record
51420 Hunters Crossing Court
Granger IN 46530
(219) 674-0718

Attorneys for Petitioner

39 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether an employee covered by a Collective Bargaining Agreement, which contains a broad arbitration clause, be terminated without benefit of arbitration when the employer raises allegations of client abuse against the employee?

2. Does the majority opinion of the Fifth Circuit Court of Appeals violate established principles of labor law?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

ARGUMENT 6

CONCLUSION 14

APPENDIX 1a

Fifth Circuit Opinion 1a

Trial Court Opinion 11a

La Adm. Code 48:5583 . . . . . 16a

42 C.F.R. § 483.420(d)(1) and (2) 17a

Excerpts from the Collecting Bargaining Agreement . 18a

TABLE OF AUTHORITIES

AT& T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 106 S. Ct. 1415 (1986) 11, 12, 13

Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 90 S. Ct. 1583 (1970) 11

Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 94 S.Ct.629 (1974) 13

Litton Financial Printing Division v. National Labor Relations Board, 501 U.S. 190, 111 S. Ct. 2215 (1991) 13

Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 104 S. Ct. 1844 (1984) 11

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S. Ct. 912 (1957) 10

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S. Ct. 1343 (1960) 9, 10

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347 (1960) 10, 13

STATUTES AND OTHER AUTHORITIES:

28 U.S.C. § 185 4

28 U.S.C. § 1254 1

28 U.S.C. § 1291 6

29 U.S.C. § 185(a), Labor Management Relations Act of 1947 (Taft-Hartley) 2, 9, 10

Fed. R. App. P. 4(a)(1) 1

42 C.F.R. § 483.420 (d)(1) and (2) 3, 12

Louisiana Administrative Code, 48:5583 . . . . . 3, 12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LOCAL 100, SERVICE EMPLOYEES INTERNATIONAL UNION,

Petitioner

v.

FOUNDATION INDUSTRIES, INC.

Respondent

Petition for a Writ of Certiorari to the Supreme Court

PETITION FOR A WRIT OF CERTIORARI

The petitioner Local 100, Service Employees International Union respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding September 23, 1996.

OPINIONS BELOW

By a vote of 2 to 1 the Fifth Circuit Court of Appeals, in an unpublished opinion and without benefit of oral argument, reversed the decision of the trial court and rendered judgment in favor of the Respondents, Foundation Industries. The reversal is reprinted in the Appendix herein at App. 1a.

The United States District Court for the Eastern District of Louisiana was allotted the case from the Middle District. Cross motions for summary judgment were filed and the trial court ruled in favor of Local 100, Service Employees International Union, the Petitioner. On information and belief the opinion of the trial court has not been reported, and is reprinted in the Appendix herein at App. 11a.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) because petitioner Local 100, Service Employees International Union has been denied relief sought by the United States Court of Appeals of the Fifth Circuit, by unpublished opinion dated September 23, 1996.

STATUTORY PROVISIONS

The Labor-Management Relations Act of 1947 (Taft-Hartley), § 301(a), codified at 29 U.S.C. § 185(a) provides that "[s]uits for violation of contract between an employer and a labor organization representing the employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any District

Court of the U.S. having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties."

42 C.F.R. § 483.420 (d)(1) and (2). Those provisions are reprinted in the Appendix herein at 17a.

Louisiana Administrative Code, 48:5583 is reprinted in the Appendix herein at 16a.

STATEMENT OF THE CASE

Local 100, Service Employees International Union (hereinafter "Local 100") is a labor organization which represents certain employees of Foundation Industries, Inc. (hereinafter "Foundation")

Foundation operates an adult day care facility in Zachary, Louisiana. Adult day care facilities are licensed and monitored by the Louisiana Licensing Bureau and the Region II Office for Citizens with Developmental Disabilities, Louisiana Department of Health and Hospitals. In addition to the Louisiana regulations, Foundation, which provides services to ICF/MR clients, is monitored by the Federal Licensing Authority.

A Collective Bargaining Agreement (hereinafter "Agreement") between Foundation and Local 100 was entered into on October 1, 1993. Ms. Antonia Griffin was employed by Foundation as a Production Supervisor, a position covered by the Agreement.

On or about December 9, 1993, Ms. Griffin was suspended, pending the outcome of an investigation of abuse and neglect. Soon after, on or about December 21, 1993, Ms. Griffin was terminated.

Immediately after her termination (December 21, 1993), Local 100 filed a grievance concerning the termination of Ms. Griffin. On or about January 24, 1994, Foundation, through legal counsel, refused to arbitrate the grievance of Ms. Griffin on the grounds that it fell within the parameters of Article 11, Section 14 of the Agreement which defines Exclusions from Arbitration. The relevant portion of that provision reads, "[n]o grievance shall be arbitrable which could affect the license of the Company or steps taken to remedy any deficiency report or abuse of client rights." (See 18a for the full text of that provision).

Actions of the Trial Court

On July 21, 1994, Local 100 sought to compel arbitration from Foundation concerning the termination of Ms. Antonia Griffin in accordance with the Agreement, by filing suit in federal district court in the middle district of Louisiana. Jurisdiction in the District Court was found proper under 28 U.S.C. § 185. By order dated February 16, 1995, the case was allotted to a federal judge in the eastern district of Louisiana for further proceedings.

Cross motions for summary judgment were filed by the parties along with a joint stipulation of facts. Foundation denied that the arbitration clause in the Agreement extended to Ms. Griffin's termination. Foundation moved for summary judgment on February 27, 1995, arguing that the arbitration clause in the Agreement did not extend to terminations that result from issues that could affect the company's license or steps taken to remedy client abuse and neglect.

Local 100 moved for summary judgment on April 24, 1995, arguing that the termination fell well within the bounds of arbitrable issues. In particular, Local 100 advanced the following arguments:

-- Foundation's attempt to use Article 11, Section 14

of the Agreement to avoid arbitration of the termination is, in effect, a presupposition that the grounds alleged for the termination are true. This would be, essentially, a ruling on the potential merits of the underlying claims in contravention of established principles of arbitration law.

-- The termination of Ms. Griffin was arbitrable under the Agreement. Under Foundation's theory, Foundation would have the power to determine arbitrability merely by alleging client abuse.

-- Given the broad language in the arbitration clause of the Agreement, arbitration as an issue is, itself, arbitrable under the agreement due to the existence of a presumption of arbitrability.

On May 24, 1995 the District Court entered a final order and judgment, rejecting Foundation's motion for summary judgment and claim of exclusion from arbitration, and granting plaintiff Local 100's motion for summary judgment. The District Court rejected Foundation's arguments with the following legal conclusions:

-- "Foundation cannot claim that its license will be affected until the allegations of abuse or neglect are proven. Therefore, [the Article 11, Section 14] exclusion is inapplicable until the merits of the termination are evaluated."

-- "[T]he Collective Bargaining Agreement provides for arbitration of . . . 'grievances involving discharge or suspension of an employee, [which] . . . shall be . . . considered jurisdiction of the arbitrator.' Thus, this provision clearly envisions arbitration as a means of redressing a termination."

-- "[T]o accept Foundation's position would, in essence, render arbitration meaningless because all Foundation need do is claim that a termination is the result of 'abuse or neglect.'"

(App. 11a).

Actions of the Fifth Circuit Court of Appeals

On June 2, 1995, Foundation appealed the trial court decision to the United States Court of Appeal for the Fifth Circuit. Accordingly, jurisdiction by the Fifth Circuit Court of Appeals was obtained under 28 U.S.C. § 1291.

Briefs were filed by the parties in August of 1995. Oral arguments were requested. Oral arguments were initially set for January of 1996. Instead, just prior to the date for oral argument, notice was sent by the court to the parties that oral argument was found to be unnecessary and that the case would be decided on the record and brief on file. About a month later, on February 8, 1996, the parties were directed to submit an additional five page letter brief on a particular topic.

On September 23, 1996, DeMoss and Dennis, Circuit Judges, and Duplantier, District Judge sitting by designation, rendered their decision. The decision of the trial court was reversed by a vote of 2 to 1. Pursuant to Local Rule 47.5, the court determined that the opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

ARGUMENT

Introduction

This case arises from Foundation's refusal to submit the determination of whether Ms. Griffin should be terminated to arbitration as provided by the Agreement. This case poses a simple issue of contract construction. The interpretation upheld by the District Court compelling

arbitration in this instance is logical, best reflects the intent of the arbitration clause, and is consistent with applicable state and federal law. The interpretation put forth by Foundation, and adopted by the Fifth Circuit, is overly broad, would render the arbitration clause useless, and departs from established precedent.

The Majority Opinion Violates Well-Established Principles Of Labor Law

The majority opinion, if allowed to stand, would enable employers to unilaterally change a collective bargaining agreement and thus render such agreements impotent. Judge Dennis correctly points out in his dissent that the employer, under the majority's analysis, would be free of any duty to arbitrate without showing that the particular grievance fell within an exception to the broad arbitration clause. The presumption of arbitrability that has always attached to a grievance brought under a collective bargaining agreement with an arbitration clause, and was validated by this Court as long ago as the Steelworkers cases, is effectively sidestepped by the majority opinion.

As the dissent again correctly notes, the majority opinion oversteps the role of the courts by addressing the merits of the grievance itself, rather than limiting its inquiry to the issue of arbitrability of the grievance. The majority wanders off into questions of how the employee's alleged abuse or neglect of patients may affect the employer. The fact remains that there has never been any determination of the facts in this grievance, because the employer unilaterally refused to participate in the process that would have made that determination -- arbitration as laid out in the Agreement

for which the employer bargained, which the employer signed, and by which the employer is bound. There has never been an opportunity to argue or prove the merits of the grievance.

Such a radical curtailment of principles of labor relations law, especially under the circumstances of the Fifth Circuit's ruling -- an unpublished opinion, rendered after a denial of a request for oral argument, voted for by only one Fifth Circuit Judge and one District Court Judge sitting ad hoc, with a dissenting opinion -- should clearly be reviewed by this Court.

The View Adopted by the Fifth Circuit Gives the Employer the Power to Unilaterally Withdraw Any Matter from Arbitration, Rendering the Arbitration Clause Useless.

In its Motion for Summary Judgment, Local 100 argued that, under the provisions of the Agreement pertaining to arbitration, in particular Article 11, section 14, the termination of Ms. Griffin was subject to arbitration. Local 100 further argued that allowing Foundation to claim an exclusion from arbitration on the point of alleged client abuse would give Foundation the authority to determine arbitrability.

The District Court agreed with these points, stating that:

> Foundation cannot claim that its license will be affected until the allegations of abuse or neglect are proven....
>
> The provisions ... do provide for arbitration to redress the termination at issue. ... The agreement does provide that

> 'grievances involving discharge or suspension of an employee .... shall be ... considered jurisdiction of the arbitrator.' Thus, this provision clearly envisions arbitration as a means of redressing a termination.
>
> ... to accept Foundation's position would, in essence, render arbitration meaningless because all Foundation need do is claim that a termination is the result of 'abuse or neglect.' Based on the Supreme Court's strong position favoring arbitration coupled with the instant agreement, this Court finds that the instant dispute is arbitrable.

(emphasis added) (App. 11a)

Local 100 submits that review of the terms of the applicable contract provisions will confirm the District Court's reasoning. The District Court found that the logical interpretation of the arbitration provisions in the Agreement lead to the conclusion that the termination of Ms. Griffin is arbitrable. The District Court's reasoning, which was adopted by Judge Dennis of the Fifth Circuit in his dissenting opinion, is in conformity with established principles of labor law.

Grievance arbitration first received statutory recognition with the enactment of the Labor-Management Relations Act of 1947 (Taft-Hartley), § 301(a), codified at 29 U.S.C. § 185(a). Section 301 (a) provided:

> Suits for violation of contract between an employer and a labor organization representing the employees in an industry affecting commerce as defined in this act, or between any such labor organizations,

> may be brought in any District Court of the U.S. having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

In 1957, the Supreme Court in *Lincoln Mills* found that Section 301 created federal substantive law, and was not merely procedural, thus providing a basis for the development of federal case law on grievance arbitration. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912 (1957). Justice Douglas' opinion found that Section 301 authorized federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements, including the power to decree specific performance. The court specifically rejected the common-law rule of revocability of a promise to arbitrate. *Id.* 353 U.S. at 456, 77 S. Ct. at 917.

Three years later the Court defined the present-day law of arbitrability in the "Steelworkers Trilogy" cases. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 574, 80 S. Ct. 1343 (1960) held that courts could not prevent a matter from going to arbitration based on the court's determination of the merits of the claim. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347 (1960) held further that the courts could not make an interpretation of the meaning of a contract where the contract provided for arbitration of any dispute over its meaning. As the Agreement between Local 100 and Foundation provides for such arbitration (Exhibit 1, Article 11), Local 100 seeks not to have this court rule on the validity of the termination but rather to compel arbitration to obtain such a ruling.

The *Steelworkers* decisions give this court "... the duty of determining whether the reluctant party has breached his promise to arbitrate." *Id.* 363 U.S. at 582, 80 S. Ct. at 1353.

Given the broad federal policy in favor of labor arbitration, this court should uphold the District Court's order to compel Foundation to submit to arbitration. *Boys Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 90 S. Ct. 1583 (1970); *see also, Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-372, 104 S. Ct. 1844 (1984) (recognizing the greater institutional competence of arbitrators in interpreting collective-bargaining agreements and the national labor policy of peaceful resolution of labor disputes). Foundation's attempt to use Article 11, Section 14 of the Agreement to avoid arbitrability of a termination is in effect a presupposition that the grounds alleged for the termination are true. Allowing such a position to stand without benefit of review would render the grievance procedure an empty shell game; in this case, Foundation can now cite "abuse of client rights" as a ground for any and all discipline and deny employees and Local 100 the protection that the grievance procedure was clearly intended to provide. Essentially, Foundation has been handed the power to determine arbitrability.

Furthermore, the Fifth Circuit's ruling that Ms. Griffin's termination was not arbitrable, is essentially a ruling that patient abuse occurred--a ruling on the potential merits of the underlying claims. Only if patient abuse occurred would the termination issue be non-arbitrable. Therefore, the Fifth Circuit's decision is in contravention of established principles of arbitration law. *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S. Ct. 1415 (1986) (holding that in deciding whether parties have agreed to submit a particular grievance to arbitration, the court is not to rule on the potential merits of the underlying claim, nor should the court even entangle itself in the merits). The abuse and neglect policy does not provide a means to bypass the Collective Bargaining Agreement. In accordance with Article 11,

section 14 of the Agreement, arbitration is the means for resolving grievances. When employee misconduct, such as client abuse and neglect, is alleged, it is the employee's right to arbitrate the outcome of the allegation investigation. Since the Agreement is a contract protecting all employees, signed by the employer, the employees cannot be made to contract separately in contradiction to the Agreement.

Foundation has consistently argued that Federal and state regulations concerning abuse and neglect must be incorporated into the Agreement, and that any collective bargaining agreement could not be contrary to these regulations. (In its brief to the Fifth Circuit, Foundation cited to 42 C.F.R.483.420(d)(1) and (2), which is reprinted at App. 17a). The state regulation cited, however, requires only that Foundation have "[a] procedure for disciplining staff members who abuse or neglect clients." La. Adm. Code, 48: 5583. The grievance procedures in the Agreement are clearly a part of such a procedure. Far from contradicting the regulations, the grievance procedure comports with them, providing both protection for clients and due process for employees.

Foundation further argued that submission of a dispute to arbitration is somehow indistinguishable from failure to investigate and take action. Local 100 does not contest in the least Foundation's right to investigate charges of abuse and invoke the disciplinary process, and in this case Foundation did so. It is Foundation's unilateral decision to truncate the disciplinary process at any self-serving point that is at issue.

The Agreement does not, as Foundation claimed, give the company the unfettered right to deal with incidents or allegations of abuse and neglect. Rather, it provides systematic procedures designed to safeguard both client and employee rights.

Foundation suggested in its brief to the Fifth Circuit that if denied the right to arbitrate an employee's termination, the union could resort to state and Federal courts to enforce

the employee's rights. In an employment-at-will state such as Louisiana, there is no such remedy available. It is only under the Agreement and its disciplinary procedures that such protection from unreasonable termination exists.

Finally, the Fifth Circuit departed radically from precedent in this particular instance on the import which should be given to a broad arbitration clause. Courts have held that where an agreement such as this one contains a broad arbitration clause, there is a presumption of arbitrability which can only be undercut by the most forceful of evidence. *See, e.g., Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190, 209, 111 S. Ct. 2215 (1991)(reaffirming the presumption of arbitrability for labor disputes); *see also, Warrior & Gulf Navigation Co.*, 363 U.S. 582, 80 S. Ct. 1353 (upholding a strong presumption of arbitrability). Foundation suggested that the exclusionary clause to arbitration amounts to such forceful evidence. However, in *AT&T Technologies*, which was relied upon by Foundation to support its claim, the Court affirmed the principle that arbitration of a particular grievance must be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of interpretation that covers the asserted dispute." *Id.* 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-583)(emphasis added); *see also, Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374, 94 S. Ct. 629, 635 (1974)(holding that the collective bargaining agreement then in force imposed on parties a compulsory duty to arbitrate the issues drawn out in the agreement). In the case at hand, the most reasonable interpretation of the arbitration clause is that it applies to Ms. Griffin's grievance. The arbitration clause itself is broad, and the exception claimed by Foundation is one pertaining to "steps taken to remedy ... abuse of client rights." That exception can readily be interpreted to refer only to actual

abuse of client rights and not to mere allegations of abuse of client rights. Or the exception could refer to changes in company policies or job duties meant to remedy abuses. If the parties had meant for the clause to operate as an exception to arbitration in this instance, they would have specified that termination was to be considered a remedial "step." In light of these possible interpretations of the arbitration clause, all of which would include the issue at hand, arbitration should have been compelled.

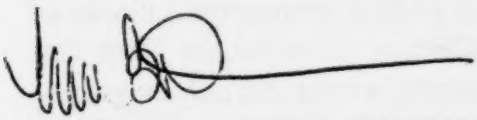
This case presents a simple issue of contract construction, with two opposing interpretations of an arbitration clause. As the District Court clearly explained, the interpretation put forth by Local 100 is the more logical and best reflects the intent of the arbitration clause. That argued by Foundation, and affirmed by the Fifth Circuit, is overly broad and renders the arbitration clause useless. If the decision that Ms. Griffin's termination is not subject to arbitration is upheld, Foundation will be given a green light to ignore grievance and arbitration provisions in the Agreement.

The language of the Agreement is clear. The parties agreed to subject their disputes to arbitration, and a strong presumption in favor of arbitrability is recognized by courts.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant the petitioner a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfuly submitted,



Steve Bachmann
51420 Hunters Crossing Court
Granger IN 46530
(219) 674-0718

Spencer Livingston
1024 Elysian Fields Ave.
New Orleans, LA 70117
(504) 943-5954

APPENDIX

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 95-30574

SERVICE EMPLOYEES INTERNATIONAL UNION,

Plaintiff-Appellee,

VERSUS

FOUNDATION INDUSTRIES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Louisiana
(94-CV-899)

Before DEMOSS and DENNIS, Circuit Judges, and DUPLANTIER[1], District Judge.

PER CURIAM[2]

---

[1]District Judge of the Eastern District of Louisiana, sitting by designation.

[2]Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set fort in Local Rule 47.5.4.

Local 100, Service Employees International Union (Union), filed this suit against Foundation Industries, Inc. (Foundation) to compel arbitration of a union employee grievance. The district court granted summary judgment in favor of the Union. We reverse.

BACKGROUND

Foundation operates an adult day care facility. Foundation and the Union are parties to a collective bargaining agreement (CBA) covering Foundation's direct care staff employees. Antonia Griffin was a Foundation employee. Griffin filed a grievance under the CBA after she was terminated. The Union filed this suit to compel arbitration of the grievance after Foundation refused to submit to arbitration. By agreement the parties filed cross-motions for summary judgment, along with a brief set of stipulated facts and certain attached documents.

The CBA provides that covered employees shall not be disciplined or discharged without "proper cause." It provides that certain grievances shall be subject to arbitration. "Grievance" is broadly defined as "any and all disputes, complaints, controversies, claims or grievances which arise regarding the interpretation, application, or breach of any of the terms of this agreement," and later references grievances "involving discharge or suspension of an employee" when setting out the internal steps to be taken before resort to arbitration. However, the CBA provides certain exclusions from arbitration in Section 14, which states:

> No grievance shall be arbitrable unless it involves an alleged material violation by the Company of one or more specific provisions of the Agreement. No grievance shall be arbitrable which could affect the license of the Company or steps taken to remedy any deficiency report or abuse of client rights.

The CBA goes on to provide that the arbitrator "shall have no power to substitute his discretion for that of the Company in cases where the Company has retained discretion or the right to act under this Agreement." The company's written abuse and neglect policy, attached to the stipulation of facts, defines client abuse to include "physical or mental injury." The policy statement, which Griffin signed, said "[a]ny alleged abuse on my part, may result in my immediate dismissal."

The parties stipulated that "[o]n or about December 9, 1993, Ms. Griffin was suspended, pending the outcome of an investigation of abuse and neglect." They further stipulated that Griffin was terminated on or about December 21, 1993. They attached to the stipulation the written notice of termination, which states that "[o]n 12-17-93 the allegation of [psychological] & physical abuse has been determined as valid. Therefore, as per company policy and procedures your employment is terminated effective 12/21/93." Griffin's written grievance forms, also attached to the stipulation, disputed that she had "physical[ly] or [psychologically][3] abuse[d] anyone," and that she "didn't have knowledge of the incident that occurred."

DISCUSSION

The procedural and substantive law governing this dispute is well settled. Arbitration is a favored method of resolving labor disputes. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Steelworkers v. Warrior & Gulf Navigation Co., 80 S. Ct. 1347, 1352-53 (1960). However, "the question of arbitrability -- whether a collective-bargaining agreement

---

[3]Both the termination form and grievance form were handwritten, and appear to misspell "psychological."

creates a duty to arbitrate the particular grievance -- is undeniably an issue for judicial determination." AT & T Technologies, Inc. v. Communications Workers of America, 106 S. Ct. 1415, 1418 (1986). In deciding whether a grievance is subject to arbitration, the court should not consider the merits of the underlying claim. Id. at 1419. Finally, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Warrior & Gulf, 80 S. Ct. at 1353.

The unrebutted summary judgment evidence jointly submitted by the parties indicates that Griffin was terminated because of the alleged abuse of a patient. The stipulated facts, the written termination form, and Griffin's own grievance all support this conclusion. Griffin offered no summary judgment evidence to the contrary.

FED. R. CIV. P. 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552 (1986). The purpose of Rule 56 is to "enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least on sworn averment of that fact before the lengthy process of litigation continues." Lujan v. National Wildlife Federation, 100 S. Ct. 3177, 3188-89 (1990).

"If a party refuses to arbitrate a question, the crucial issue is whether the collective bargaining agreement requires it to do so. In that event, arbitrability is ordinarily a question of contract interpretation for the courts." Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, 611 F.2d 580, 583-84 (5th Cir. 1980) (citations omitted). Further, questions concerning the construction or interpretation of contracts are

questions of law and are accordingly reviewed *de novo*. L & A Contracting Co. v. Southern Concrete Services, Inc., 17 F.3d 106, 109 (5th Cir. 1994); Gladney v. Paul Revere Life Ins. Co., 895 F.2d 238, 241 (5th Cir. 1990).

As we interpret the agreement, adverse personnel action taken because of *alleged* patient abuse is exempted from grievance arbitration, since the exemption applies to grievances "which *could* affect . . . steps taken to remedy any . . . abuse of client rights." Because the unrebutted summary judgment evidence indicates that Griffin was terminated for alleged patient abuse, we conclude that summary judgment should have been granted in favor of Foundation.

The district court reasoned that "to accept Foundation's position would, in essence, render arbitration meaningless because all Foundation need do is claim that termination is the result of 'abuse or neglect.'" Of course, the same could be said of any express exception to arbitration found in a CBA. We would agree that this grievance would be arbitrable if Foundation terminated Griffin for reasons other than patient abuse, and used patient abuse as a pretext to avoid arbitration. Griffin, however, offered no evidence of pretext. "We resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.*" Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (emphasis in original).

Nor would granting summary judgment in favor of Foundation run afoul of the rule that courts should not weigh the underlying merits of the grievance. We need not consider whether Griffin was fired for good cause, whether she in fact abused a patient, or whether Foundation conducted a fair investigation of the incident. Because the summary judgment

evidence indicates that Foundation terminated Griffin because it concluded she had abused a patient, and Griffin offered no evidence to the contrary, the grievance is not subject to arbitration based on our interpretation of the CBA.

Accordingly, we conclude that the district court erred in granting the Union's summary judgment motion and denying Foundation's summary judgment motion. We reverse the judgment below and render judgment in favor of Foundation.

REVERSED and RENDERED.

DENNIS, CIRCUIT JUDGE, DISSENTING.

The majority opinion violates three primary principles of labor relations law by (a) allowing the employer to unilaterally change the collective bargaining agreement without bargaining with and obtaining the agreement of the collective bargaining agent; (b) permitting the employer to avoid arbitration of a grievance without demonstrating that the grievance falls within an exception to the CBA's very broad arbitration clause; (c) weighing and deciding the merits of the grievance which should have been submitted to arbitration. Accordingly, I must dissent.

1.

The "Abuse and Neglect" policy statement by which the employer required the individual employee to agree that "[a]ny alleged abuse on my part, may result in my immediate dismissal" (emphasis added), is clearly void and irrelevant insofar as it purports to modify or supplement the collective bargaining agreement. The individual employee's agreement was obtained by the employer without bargaining with the employee's bargaining agent or obtaining its consent.

Therefore, the "Abuse and Neglect" statement constitutes a mere nudum pactum insofar as the CBA is concerned and represents a possible unfair labor practice by an employer who has attempted to unilaterally change the CBA without bargaining in good faith with the employees' collective bargaining representative.

2.

The majority opinion unjustifiably departs from clear precedents of the United States Supreme Court and this Circuit in allowing the employer to avoid its general agreement to arbitrate all grievances without requiring the employer to show that the particular grievance in this case falls within an exception to the arbitration clause. When a CBA contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960); See AT&T Technologies v. CWA, 475 U.S. 1643 (1986); Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750 (5th Cir. 1995). Such a presumption is particularly applicable where the clause is as broad as the one employed in this case. In such cases, "[i]n the absence of an express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Warrior & Gulf, 3631 U.S. at 584-585; AT&T Technologies, 474 U.S. at 650.

The employer in the present case has failed to make a showing that overcomes the presumption of arbitrability. The stipulated facts show only that (1) on or about December

9, 1993, Ms. Griffin was suspended, pending the outcome of an investigation of alleged abuse and neglect; (2) on or about December 21, 1993, Ms. Griffin was terminated; (3) on or about the same date, a grievance was filed by SEIU concerning the termination of Ms. Griffin.

The arbitration clause calls for arbitration of "all disputes . . . regarding the interpretation, application or breach of any of the terms of this agreement"; and provides that "all disputes . . . involving the discharge of or suspension of an employee . . . shall be . . . considered [within the] jurisdiction of the arbitrator." The only exclusion from arbitration provides, in pertinent part, that "[n]o grievance shall be arbitrable which could affect the license of the company or steps taken to remedy any deficiency report or abuse of client rights." Based on the sketchy stipulated facts, the employer clearly failed to show that the grievance falls with this exception; i.e., that it could affect the license of the company or steps taken to remedy any deficiency report or abuse of client rights. The stipulation says only that Ms. Griffin was suspended, pending an investigation of alleged abuse and neglect and that she was terminated, without giving any concrete facts uncovered by the investigation or reasons for the termination. Accordingly, it cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; there are doubts that should be resolved in favor of coverage; there is no express provision excluding this particular grievance from arbitration and there is no forceful evidence of a purpose to exclude the claim from arbitration. Consequently, the majority opinion is at odds with all of the principles set forth in the decisions of the Supreme Court and of this circuit.

3.

Finally, the majority commits the cardinal sin of

weighing the merits of the grievance itself instead of requiring that it be submitted to arbitration. The majority in effect finds there is no merit to Ms. Griffin's grievance that she "was terminated unfairly on December 22, 1993 [because she] . . . didn't Physical or Psyological [sic] abuse anyone." "The Courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the Court will deem meritorious." Steelworkers v. American Mfg. Co., 363 U.S. at 568 (1960); AT&T Technologies, 474 U.S. at 650.

The majority, of course, fell into this error because of its legal mistakes in assuming that : (a) the employer could unilaterally amend the CBA to give it the power to fire an employee based upon the employer's allegation of such misbehavior and escape arbitrating the resulting grievance; and (b) the CBA, as so unilaterally amended, gives the employer the right to determine unilaterally when a grievance "could affect the license of the company or steps taken to remedy any deficiency report or abuse of client rights." The district court was correct when it observed that "to accept Foundation's position would, in essence, render arbitration meaningless because all Foundation need do is claim that a termination is the result of 'abuse or neglect.'"

4.

The majority opinion continues a disturbing trend by panels of this court of departing radically from precedents of this circuit and the Supreme Court in unpublished opinions that may seriously undermine precepts that have served the labor relations community well and have led to continued reliance on arbitration, rather than strikes or lockouts, as the

preferred method of resolving disputes arising during the term of a collective bargaining agreement. See Pastorini-Bosby Talent, Inc., et al v. Screen Actors Guild Inc., et al., No. 95-20344, February 28, 1996. These precepts were set out by the Supreme Court in a series of cases known as the Steelworkers Trilogy: Steelworkers v. American Mfg., Co., 363 U.S. 564 (196); Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (196); and Steel workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). There is no reason either to question their continuing validity or to eviscerate their meaning by creating an exception to their general applicability. AT&T Technologies v. Communications Workers, 474 U.S. 643 (1986); See Smith Barney Shearson, Inc. v. Boone, 47 F. 3d 750 (5th Cir. 1995). The fact that our panels are questioning their validity and eviscerating their meaning in unpublished, rather than published, opinions makes it less likely that the panels' errors will be corrected by this court en banc or by the Supreme Court, but it does not erase the pernicious effects that such panel decisions may have upon the labor relations community.

For these reasons and the reasons assigned by the district court, I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SERVICE EMPLOYEES INTERNATIONAL UNION
CIVIL ACTION

VERSUS

MDLA NO. 94-899

FOUNDATION INDUSTRIES, INC.
SECTION "K"

JUDGEMENT

Considering the foregoing order granting Service Employees International Union's Motion for Summary Judgment,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of plaintiff, Service Employees International Union and against defendant, Foundation Industries, Inc. ,

New Orleans, Louisiana, this 24th day of May, 1995.

_____
Stanwood R. Duval, Jr.
United States Dist. Judge

MINUTE ENTRY
DUVAL, J.
MAY 24, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SERVICE EMPLOYEES INTERNATIONAL UNION	**CIVIL ACTION**
VERSUS	**MDLA NO. 94-899**
FOUNDATION INDUSTRIES, INC.	**SECTION "K"**

Before the Court are Cross Motions for Summary Judgment. The parties have stipulated to the facts. The sole issue before the court is whether the dispute at issue is one to be arbitrated under the collective bargaining agreement.

Foundation contends that the dispute at issue is excluded from arbitration. SEIU, on the other hand, contends that the collective bargaining agreement requires arbitration of the instant dispute.

STIPULATED FACTS

The following facts are stipulated to by the parties:

1. SEIU is a labor organization which represents certain employees of Foundation.
2. Foundation operates an adult day care facility in Zachary, La.
3. Adult day care facilities are licensed and monitored by the Louisiana Licensing Bureau and the Region II Office for Citizens with Developmental Disabilities, Louisiana Dept of Health and Hosp.

4. In addition to the Louisiana regulations, Foundation, which provides services to ICF/MR clients, is monitored by the Federal Licensing Authority.
5. Ms. Antonia Griffin was employed by Foundation as a Production Supervisor, a position covered by the Collective Bargaining Agreement.
6. On or about December 9, 1993, Ms. Griffin was suspended, pending the outcome of an investigation of alleged abuse and neglect.
7. On or about December 21, 1993, Ms. Griffin was terminated.
8. On or about December 21, 1993, a grievance was filed by SEIU concerning the termination of Ms. Griffin.
9. On or about January 24, 1994, Foundation through legal counsel, refused to arbitrate the grievance of Ms. Griffin.

ANALYSIS

The following provisions of the collective bargaining agreement are essential to the resolution of this dispute:

Definition of Grievance

For the Purposes of this agreement, a grievance is defined as any and all disputes, complaints, controversies, claims or grievances which arise regarding the interpretation, application, or breach of any of the terms of this agreement.

Appeal to Arbitration

Within fifteen (15) days of the receipt of the answer to Step 2, the Union may appeal the grievance to arbitration by writing for a panel of seven (7) neutral arbitrators from the Federal Mediation and Conciliation Service, a copy of such letter to the other panel. Upon receipt of the panel of arbitrators the parties shall alternately strike names.

Right to Arbitrate

Only the Union shall have the right to take to arbitration any grievance which is otherwise arbitrable under this Agreement. If the Union falls [sic], refuses or declines to prosecute a grievance on behalf of an employee, or if the Company and the Union settle any grievance on behalf of an employee hereunder, the employee who has filed such grievance or on whose behalf it has been filed shall be conclusively bound thereby and both the Union and the aggrieved employee shall thereafter be estopped to revive or further prosecuted [sic] said grievance.

Exclusions from Arbitration

No grievance shall be arbitrable unless it involves an alleged material violation by the Company of one or more specific provisions of the Agreement. No grievance shall be arbitrable which could affect the license of the Company or steps taken to remedy any deficiency report or abuse of client rights.

Foundation argues that the termination is excluded from arbitration claiming that the discharge is a step taken to remedy abuse or neglect. Further, Foundation contends that its handling of the termination at issue could affect its license. The Court finds these arguments to be without merit.

Foundation cannot claim that its license will be affected until the allegations of abuse or neglect are proven. Therefore, the above-quoted exclusion is inapplicable until the merits of the termination are evaluated.

In AT&T Tech., Inc. v. Communications Workers, 106 S. Ct. 1415 (1986), the Supreme Court stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." Further, the question of whether the

parties agreed to arbitrate is to be decided by the court, not the arbitrator. Id. at 1418. Doubts should be resolved in favor of coverage. Id. at 1419. The presumption in favor of arbitration, however, is not applicable if there is an express provision excluding a particular grievance from arbitration. Id. Further, in United Steelworkers of America v. Warrior & Gulf N. Co., 80 S. Ct 1347 (1960), the Supreme Court stated that "[a]n order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Id. at 1353.

Unfortunately, the instant Collective Bargaining Agreement was not artfully drafted. The provisions quoted above, however, do provide for arbitration to redress the termination at issue. Specifically, the Collective Bargaining Agreement provides for arbitration of "any grievance which is otherwise arbitrable under this Agreement." The agreement does provide that "grievances involving discharge or suspension of an employee . . . shall be . . . considered jurisdiction of the arbitrator." Thus, this provision clearly envisions arbitration as a means of redressing a termination.

Further, to accept Foundation's position would, in essence, render arbitration meaningless because all Foundation need do is claim that a termination is the result of "abuse and neglect." Based on the Supreme Court's strong position favoring arbitration coupled with the instant agreement, this Court finds that the instant dispute is arbitrable.

Considering the foregoing,

IT IS ORDERED that the Motion for Summary Judgment filed on behalf of Service Employees International Union be and is hereby **GRANTED.** Thus, Foundation's Motion for Summary Judgment be and is hereby **DENIED.**

(Signed).

5583. ABUSE AND NEGLECT

A. The agency shall have a comprehensive, written procedure concerning client abuse which includes:

1. Current definitions of abuse and neglect and reporting requirements and applicable laws;
2. A procedure for immediate reporting of any suspected incident to the director or his/her designee and a complete investigation report within ten working days;
3. A procedure for ensuring that the client is protected from potential harassment during the investigation;
4. A procedure for disciplining staff members who abuse or neglect clients.

42 C.F.R. § 483.420 (d)(1) and (2)

483.420 Condition of participation: Client Protection

(d) Standard: Staff treatment of clients

(1) The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, or abuse of the client.

(i) Staff of the facility must not use physical, verbal, sexual or psychological abuse or punishment.

(ii) Staff must not punish a client by withholding food or hydration that contributes to a nutritionally adequate diet.

(iii) The facility must prohibit the employment of individuals with a conviction or prior employment history of child or client abuse, neglect or mistreatment.

(2) The facility must ensure that all allegations of mistreatment, neglect or abuse, as well as injuries of unknown source, are reported immediately to the administrator or to other officials in accordance with State law through established procedures.

Excerpts from Collective Bargaining Agreement

ARTICLE 11. SETTLING DISPUTES AND GRIEVANCES

Section 2. Definition of Grievance

For the Purposes of this agreement, a grievance is defined as any and all disputes, complaints, controversies, claims or grievances which arise regarding the interpretation, application, or breach of any of the terms of this agreement.

Section 7. Appeal to Arbitration

Within fifteen (15) days of the receipt of the answer to Step 2, the Union may appeal the grievance to arbitration by writing for a panel of seven (7) neutral arbitrators from the Federal Mediation and Conciliation Service, a copy of such letter to the other panel. Upon receipt of the panel of arbitrators the parties shall alternately strike names.

Section 13. Right to Arbitrate

Only the Union shall have the right to take to arbitration any grievance which is otherwise arbitrable under this Agreement. If the Union falls [sic], refuses or declines to prosecute a grievance on behalf of an employee, or if the Company and the Union settle any grievance on behalf of an employee hereunder, the employee who has filed such grievance or on whose behalf it has been filed shall be conclusively bound thereby and both the Union and the aggrieved employee shall thereafter be estopped to revive or further prosecuted [sic] said grievance.

Section 14. Exclusions from Arbitration

No grievance shall be arbitrable unless it involves an alleged material violation by the Company of one or more specific provisions of the Agreement. No grievance shall be arbitrable which could affect the license of the Company or steps taken to remedy any deficiency report or abuse of client rights.